United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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76-1041

To be argued by ROBERT J. ERICKSON

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

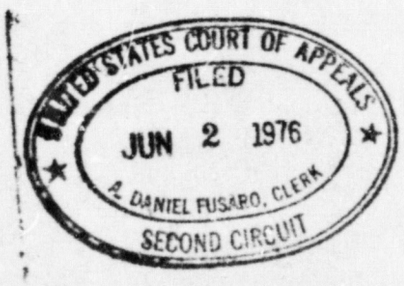
UNITED STATES OF AMERICA,
APPELLEE

v.

DAVID GUILLETTE and ROBERT JOOST,
APPELLANTS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR APPELLEE



PETER C. DORSEY,
United States Attorney,
New Haven, Conn. 06508,

PAUL E. COFFEY,
Special Attorney,
Hartford, Conn. 06103,

ROBERT J. ERICKSON,
Attorney,
Department of Justice,
Washington, D.C. 20530.

I N D E X

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Statutes and Rule Involved:

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ISSUES PRESENTED

1. Whether conspiracy to murder a federal witness is prosecutable under I8 U.S.C. 241. (Appellants' Brief, XI).

2. Whether the trial court properly refused to dismiss the indictment (Appellants' Brief, VIII, IX).

3. Whether the trial court abused its discretion by denying Joost's severance motion (Appellants' Brief, VII).

4. Whether Joost's conspiracy conviction was barred by the doctrine of collateral estoppel (Appellants' Brief, IV).

5. Whether the trial court abused its discretion by limiting the cross-examination of Marrapese (Appellants' Brief, VI).

6. Whether the trial court properly excluded the unsubstantiated hearsay statements of an unavailable declarant (Appellants' Brief, V).

7. Whether appellants were entitled to an alibi instruction (Appellants' Brief, II).

8. Whether appellants were prejudiced by various jury instructions (Appellants' Brief, I, III).

9. Whether there was sufficient evidence to support appellants' conviction (Appellants' Brief, X).

STATEMENT

On June 14, 1973 a federal grand jury in Hartford, Connecticut returned a three count sealed indicted (# H-524) against appellant David Guillette, appellant Robert Joost, William Marrapese, and Nicholas Zinni, primarily alleging a conspiracy to deprive Daniel LaPolla, a federal witness, of a civil right secured by the Constitution, in violation of 18 U.S.C. 241 (Count I). The grand jury alleged that the conspiracy began in May, 1972 and resulted in LaPolla's death on September 29, 1972. In related counts the indictment charged that the four defendants obstructed justice by force and violence, in violation of 18 U.S.C. 1503 (Count II), and that they used an explosive device in the commission of a felony, in violation of 18 U.S.C. 844(h)(1) (COUNT III).

Following the instant jury trial in the United States District Court for the District of Connecticut,[1/] in which codefendant Marrapese appeared as the principal government witness, both appellants were convicted of the charged conspiracy

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1/ The trial below was not the first trial in this case. Following their joint indictment, the case against appellants was severed from that against Marrapese and Zinni on October 24, 1973. That same day appellants' original trial before Judge Clarie commenced and on January 10, 1974, appellants were convicted on all three counts of the indictment. On May 28, 1974, the trial of Marrapese and Zinni commenced before Judge Jurphy; both were convicted on all three counts. John Housand appeared as the principal government witness in each of these trials.

Thereafter, all defendants appealed their convictions to this Court (See, United States v. Guillette, et al., No. 74-1333; United States v. Zinni, No. 74-1941), but on February 20, 1975, Marrapese voluntarily withdrew his pending appeal. During the pendency of their appeal, appellants (CONT'D)

which resulted in LaPolla's death. In addition, Guillette was convicted of obstructing justice, but was acquitted of using an explosive device in the commission of a felony. Appellants were sentenced as follows: Guillette, 25 years' imprisonment on Count 1 and five years' imprisonment on Count II, the terms to run concurrently; Joost, 25 years' imprisonment on Count I.

The Witness

On November 21, 1971, the Westerly, Rhode Island National Guard Armory was forcibly entered and 30 M-16 automatic rifles were stolen (Tr. III, 45-46).[2/] That same morning appellants drove to William Marrapese's home to inquire whether he knew of a buyer for the stolen rifles (Tr. I, 111-112, 115-1[illegible]. Marrapese had no immediate buyer, but he agreed

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1/ (CONT'D) filed a motion for a new trial, alleging government suppression of exculpatory material and perjurious testimony on the part of Housand. During the same time, Housand recanted the testimony which he had given as a government witness, but Marrapese agreed to testify for the government. In view of these pending allegations in the district court, this Court remanded the case and following hearing on appellants' motion, Judge Clarie granted a new trial on April 18, 1975.

On July 28, 1975, a trial commenced before Judge Newman, with Marrapese as the principal government witness. The jury was unable to reach a verdict as to any of the counts against Guillette or the conspiracy counts against Joost and Zinni; however, Joost and Zinni were acquitted on all substantive counts. In addition, Andrew Bucci, an attorney intimately connected with defendants who had since been indicted, was acquitted on the conspiracy count. Subsequently, appellants were tried in the instant proceedings before Judge MacMahon.

We note further that Housand has since been convicted of making a false statement and obstruction of Justice, both charges relating to his recantation (See, Crim. No. H-75-40, D. Conn., February 12, 1976). Attorney Bucci was also convicted of conspiring to induce Marrapese's perjured testimony in a related case (See, Crim. No. H-75-39, D. Conn., January 30, 1976).

2/ "Tr." refers to the separately pagainated eleven volume transcript of the trial below.

to contact Danial LaPolla, through Nicholas Zinni, to see if the weapons could be hidden at LaPolla's home until a buyer was found (Tr. I, 116-118). After arrangements were made, appellants, Marrapese and Zinni drove to LaPolla's home in Oneco, Connecticut (Tr. I, 119, 130-132). There, Guillette opened the trunk of his automobile, which contained the stolen weapons (Tr. I, 132). After appellants wiped the rifles of fingerprints, LaPolla stored them in a closet of his house (Tr. I, 133-134). Marrapese then left with appellants, taking one of the rifles with him as a sample for any prospective customers. (Tr. I, 134).[3/]

Two months later LaPolla began to cooperate with federal agents, and, on January 25, 1972, twenty-nine of the stolen rifles were recoverdd from a water-filled quarry located one mile from LaPolla's home (Tr. IV, 169-172; Tr. V, 15-16). LaPolla's cooperation continued, and on March 31, 1973, while wearing a body transmitter, he went to Marrapese's place of business, American Universal Gold Buyers (AUGB), and engaged

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3/ At the trial below, appellant Guillette admitted his involvement in the theft of the M-16s (Tr. VII, 203-204). Joost, however, denied any involvement (Tr. VIII, 157, 165).

Marrapese and Zinni in a conversation relating to the disposition of the stolen weapons (Tr. IV, 172-177; Tr. V, 16-18, 24).[4/] Subsequently, on May 3, 1972, LaPolla appeared before a federal grand jury investigating the theft of the M-16 rifles (Tr. IV, 178; Tr. V, 25-26). The following day, Guillette, Joost, Marrapese and Zinni were arrested for interstate transportation of stolen firearms.

The Conspiracy

After his arrest, Marrapese was taken to the federal building in Hartford, Connecticut, where he was placed in a cell with Guillette (Tr. I, 143). There, the two met with Andrew Bucci, an attorney. Bucci noted that LaPolla was named as an unindicted co-conspirator in the indictment and expressed his feeling that LaPolla was an informant in the case (Tr. I, 143-147). Following his arraignment and release on bail, Marrapese returned to Providence, Rhode Island with Bucci and Zinni. During the drive, Bucci reiterated his belief that LaPolla was an informant (Tr. I, 151-155).

Before 8:00 a.m. on the morning May 8, 1972 Marrapese left his house to drive to a 10:00 court appearance in Providence.

4/ A complete transcript of this conversation is set out in United States v. Marrapese, 486 F.2d 918, 920 n. 2 (2nd Cir. 1973), cert. denied, 415 U.S. 944 (1974), in which Marrapese and Zinni were convicted for conspiring to transport and dispose of the stolen rifles. LaPolla was murdered before he could testify in that trial.

En route, he picked up Bucci and Zinni and the three men stopped and entered AUGB (Tr. 159-161). Noticing that the doors which connected his business place with Carter's Jewelry were open, Marrapese proceeded into the jewelry store (Tr. I, 165-166).[5/] While in the jewelry store, Guillette, Joost, and Housand arrived without prior arrangement (Tr. I, 167-168). Marrapese admitted them and they all--with the exception of Zinni--proceeded to the back work area at Carter's (Tr. I, 168-169).

Guillette said that he "had spoke[n] to Housand and John had agreed to dump Danny LaPolla for 5,000," which Marrapese explained meant to murder LaPolla for a $5,000 fee (Tr. I, 170). Joost responded that all they ha[d] to do [wa]s find him (Ibid.). Marrapese responded that the cost of "1200 apiece" did not "sound bad" and volunteered to locate LaPolla (Tr. I, 171). Guillette said that he would get "a clean piece" for Housand to use to shoot LaPolla (Tr. I, 1972). Thereafter the meeting broke up and the participants departed.

Marrapese, Zinni, and Bucci continued on to Providence. During the drive, Bucci said he thought "it was stupid to do anything like this [kill LaPolla] so soon." He counseled that they should first "wait and see what the Government had for a

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5/ AUGB and Carter's Jewelry were located in the same building, which Marrapese owned. On May 8, Carter's was no longer in operation, and the lease had been terminated (Tr. I, 104-105, 166).

case" and said that an associate of his would file motions to discover this. (Tr. I, 177).

The next day Marrapese met with Joost and related Bucci's advice that they should "[hold] up on getting rid of LaPolla for now until [Bucci] could see what the Government had for a case." (Tr. I, 184). Joost concurred in this advice (Ibid.). However, Joost added that Guillette had taken Housand to Woonsocket, Rhode Island on the previous night and obtained a "piece" for Housand(Ibid.). On May 10, Marrapese related Bucci's advice to Guillette, who also agreed with the advice. At Marrapese's urging, Guillette also said he would get the weapon which he had given Housand (Tr. I, 184-185).

During May and June, Marrapese concentrated his efforts in an attempt to locate LaPolla, first by telephone and then by daily trips to Oneco(Tr. I, 186-187). As Marrapese had advised appellants, he was going to offer to forgive a $2500 debt which LaPolla owed him, or, in the alternative, "whack him around" in order to prevent his testimony in the firearms case (Tr. I, 187-188). These attempts to find LaPollo were unsuccessful and Marrapese discontinued his efforts following his father's death on July 5 (Tr. I, 198).

In late July Marrapese went to Guillette's home in Providence. Guillette stated that he was unhappy about the progress Marrapese was making in locating LaPolla, and told Marrapese that if LaPolla was not found and persuaded to cooperate would have to have him killed (Tr. I, 199-200;

Tr. II, 24). Marrapese said that he would resume his efforts, and the following day he posed as a member of the Attorney General's staff in an unsuccessful attempt to learn LaPolla's whereabouts from LaPolla's sister (Tr. I, 200-201; Tr. IV, 149-151).

On September 7, Marrapese and Joost drove to Oneco and parked their vehicle on a highway located approximately 500 yards from LaPolla's house (Tr. I, 208-209).[6/] While Marrapese remained in the car, Joost took a walkie-talkie and walked through the woods until he was in a position to observe LaPolla's house (Tr. I, 209-210). This surveillance continued from early morning to early afternoon when Joost radioed Marrapese to inform him that a gold colored car had just approached LaPolla's house and departed. Moments later the gold car passed the place where Marrapese was parked. Recognizing the occupants as federal agents, Marrapese quickly left the area, leaving Joost in the woods. (Tr. I, 210-212).

Guillette subsequently contacted one Roger Williams, a pilot, and asked if he would take Guillette on an aerial photo-reconnaissance flight (Tr. V, 143, 157). Guillette explained that

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6/ Previous to this trip Marrapese, Guillette, and Joost had listened to four cassette tapes which LaPolla had recorded while wearing a hidden transmitter. The tapes were obtained pursuant to a motion for discovery of electronic surveillance. The tapes could not be understood, however, and it was Bucci's opinion that they would therefore be inadmissible (Tr. I, 201-206).

he was engaged in detective work and that he and his partner Joost were trying to serve papers on a person whom they had not been able to locate (Tr. V, 144-145, 149-150). On September 23, Guillette, Joost, and Williams met at the RICONN Airport, which was located a short distance from Oneco. Guillette accompanied Williams in the airplane and directed him to fly over LaPolla's house. Joost established a ground surveillance of the house and maintained contact with Guillette by use of a walkie-talkie (Tr. V, 146-149, 157-169).

During the flight, Guillette and Williams briefly landed at an airport and lost radio contact. When they were again airborne, Joost radioed, "He was here and now he's gone. He recognized me," referring to a man in a white car who resembled LaPolla (Tr. VIII, 167).[7/] Thereafter, Guillette and Williams searched the area for a white car, descending each time they saw one (Tr. V, 153).[8/]

7/ Joost denied that he was looking for LaPolla and testified that he wanted Guillette to warn him if LaPolla's car was seen so that he could leave the area. Joost explained this by saying that he did not want his bail revoked for harrassing a witness (Tr. VIII, 66-67). On cross-examination, however, Joost admitted that rather than leaving the area when he saw a man resembling LaPolla, he went back to ascertain whether the man was in fact LaPolla (Tr. VIII, 167).

8/ A week later and following LaPolla's death, Guillette said that his name had appeared in a newspaper article about the explosion at LaPolla's house and asked Williams "not to say anything" about the flight (Tr. V, 154-155; Tr. VII, 193).

A meeting attended by appellants and Marrapese was held at Bucci's office on the morning of September 25. After Marrapese had detailed some of the information he had acquired which might aid in locating LaPolla, Bucci interjected, "Well, if you can't find him, let him find you." When Guillette agreed that this was a good idea, Marrapese walked out of the meeting in anger (Tr. I, 212-217). However, Marrapese returned to Bucci's office later that morning. Marrapese had read in the newspaper that LaPolla's brother, a Catholic priest, had died and asked Bucci to accompany him to the wake that evening, which Bucci agreed to do (Tr. I, 217).

Marrapese was first to arrive outside the rectory where the wake was being held; he was soon joined by Guillette and Joost who said that they wanted to see if LaPolla was there (Tr. I, 222-223). Shortly thereafter Bucci arrived, and he and Marrapese approached the rectory where they were confronted by federal agents (Tr. I, 221). Marrapese was denied admission to the rectory, but Bucci was allowed to go in (Tr. I, 222; Tr. IV, 153-155; Tr. V, 33-35). Before Bucci entered, Marrapese said, "he's bald and wears thick glasses," which was a partial description of LaPolla (Tr. I, 222; Tr. IV, 185-186). About five minutes later Bucci emerged from the rectory, went to where appellants and Marrapese were waiting, and told them he had not seen anyone resembling LaPolla (Tr. I, 224). Later that night appellants returned to the rectory but saw neither LaPolla nor his automobile (Tr. I, 227-228). Subsequently,

on the morning of Fr. LaPolla's funeral, appellants were observed walking among the gravestones in the cemetery where the burial was to take place (Tr. I, 231; Tr. IV, 160-162).

On the morning of September 29, Marrapese was leaving Bucci's law office when he encountered Guillette. Guillette said that he had "just left a package for your buddy up there" (Tr. I, 234: Tr. II, 25). That afternoon LaPolla, ignoring instructions to stay out of Oneco, drove to his house, parked his white Chevrolet in the driveway with the engine still idling, opened the front door to his house, and was immediately killed by a massive explosion which decpacitated him and completely destroyed his house. He had been scheduled as the principal prosecution witness in the stolen firearms case which was to have began in early October.

The Investigation

At the scene of the explosion, the collection of evidence took several days. LaPolla's hands were swabled with chemicals (Tr. III, 143), as well as his vehicle (Tr. III, 143-146) to determine if he had recently handled dynamite. His vehicle was also vacuumed for the same reason (Tr. III, 147). All the swablings and vacuumings proved negative except for weak positive reactions on the victim's left hand (Tr. III, 198-199; Tr. IV, 55), a handkerchief, and the rear seat area of LaPolla's automobile where a window had been blown out by the explosion (Tr. IV, 56-58, 75). Had LaPolla handled dynamite preceding the explosion, however, dynamite residue could be expected to have been found on both of his hands (Tr. IV, 89-90). By contrast, positive responses were indicated on the bomb device and the upper portion of LaPolla's body.

The bomb which killed LaPolla consisted of dynamite and blasting caps wired to a 6-volt battery a block of wood, black electrician's tape, and an electrical switch (Tr. IV, 99-102).[9] By reconstructing the "seat" of the explosion, it was determined that the dynamite was suspended at chest level, with the battery and switch placed two-to-six inches behind the front door and secured to the floor by nails; an opening inward of the door caused the switch to complete the circuit and detonate the dynamite (Tr. IV, 102, 105-109).[10] From the damage to the victim's body, it was concluded that LaPolla was standing in an upright position just outside the door when the explosion occurred (Tr. IV, 110).[11]

9/ In early 1972 Marrapese was given 25 sticks of dynamite by one John Calisi. Immediately after receipt, Marrapese telephoned Guillette, who came to AUGB and picked up the dynamite from Marrapese. Marrapese never saw the dynamite again (Tr. I, 135-136; Tr. II, 25-26).

10/ Marrapese, Guillette, and one Edward Sitko met at Amando's Restaurant in Providence sometime in the spring of 1973 (Tr. II, 5-6). Marrapese was reading an article in a local newspaper about a man who lost a hand due to a letter bomb when Sitko remarked, "That's the way we should have killed LaPolla" (Tr. II, 6-7). Sitko went on to explain that he, Guillette, and a man identified only as "Red" had gone to Oneco and carefully removed a storm window from the rear of LaPolla's house so as not to leave any evidence of entry (Tr. II, 7). Guillette then said that he had entered the house and rigged a bomb on LaPolla's front door by nailing the firing device to the floor and hanging dynamite sticks along side the door. (Ibid).

11/ On September 27, 1972, federal agents had routinely checked LaPolla's house and found the doors and windows secure (Tr. IV, 180-181; Tr. V, 8-9).

On January 9, 1973, federal agents interviewed Guillette and Joost at the former's residence in Providence. After being advised of his rights, Guillette was asked if he had ever looked for LaPolla. Guillette falsely denied that he had been in eastern Connecticut on only one occasion, when he visited a friend in Danielson, Connecticut (Tr. V, 36-37).

Thereafter, on March 20, 1973, federal agents searched Guillette's home pursuant to a warrant (Tr. III, 174). In the basement they found an electrical workshop stocked with assorted tools and materials, including black electrician's tape, switches, and 6-volt batteries (Tr. III, 176). A handbook entitled "Basic Electricity" was found in Guillette's den along with a receipt indicating that the book had been purchased prior the Oneco bombing (Tr. III, 177-180).[12/]

12/ Previously, in May, 1972, an agent had been present at Guillette's residence when he observed that Guillette's electrical work shop was protected by a home-installed burglar alarm (Tr. III, 170-174). Guillette's wife testified at trial that the burglar alarm was activated when the door was opened (Tr. VI, 15).

ARGUMENT

I

18 U.S.C. 241 CONFERS FEDERAL JURISDICTION TO PROSECUTE A CONSPIRACY TO MURDER A FEDERAL WITNESS

In United States v. Pacelli, 491 F.2d 1108, 1113-1115 (2nd Cir. 1974), cert. denied, 419 U.S. 826 (1974), this Court held that a conspiracy resulting in the deal of a federal witness, designed and carried out to prevent the witness from testifying in a federal court, was an offense punishable under Section 241. Since there can be no doubt as to the status of the law on this point in this Circuit, this claim should be rejected.

II

THE COURT BELOW PROPERLY REFUSED TO DISMISS THE INSTANT INDICTMENT

A. SINCE THE INDICTMENT WAS VALID ON ITS FACE, THE COURT BELOW CORRECTLY REFUSED TO DISMISS IT

Appellants were charged in an indictment, Crim. No. H-524, which was returned by a special grand jury on June 14, 1974. That grand jury heard testimony from John Housand but not from Marrapese, who has, in effect, replaced Housand as the principal witness to the conspiracy to kill LaPolla. Because Housand was to give perjurious testimony at their initial trial, appellants contend that indictment No. H-524 should have been dismissed and a new indictment obtained from a grand jury that had heard Marrapese's testimony as well a testimony regarding Housand's trial perjury and his subsequent recantation.

The short answer to appellants' contention is that "[a]n indictment returned by a legally constituted and unbiased grand jury, ... if valid on its face, is enough to call for trial of the charges on the merits" [Costello v. United States, 350 U.S. 359, 363 (1956)] and "is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence ..." [United States v. Calandra, 414 U.S. 338, 345 (1974)]. See also, United States v. Blitz, No. 75-1237 (2nd Cir., March 25, 1976). Appellants do not contend that the indictment was returned by an illegally constituted grand jury. There was, therefore, no requirement that the indictment be dismissed so that Marrapese's trial

testimony, which substantially tracked Housand's grand jury testimony, could be presented to a grand jury whose purpose it was to determine probable cause.

In any event, Housand did not perjure himself before the grand jury and thus the indictment was not tained by perjurious testimony. When Judge Clarie granted a new trial, he found that Housand had perjured himself at appellants' initial trial in a material respect. But this concerned only Housand's denial of having previously received psychiatric treatment and went to the issue of credibility. Before the grand jury, by contrast, Housand was not questioned at all concerning his history of psychiatric treatment. Instead, Housand's grand jury testimony was primarily a rendition of events occurring in April and May, 1972, when the conspiracy was formed. Significantly, Judge Clarie did not find that Housand had perjured himself at trial when he testified concerning areas about which he testified before the grand jury.

Nor can it be successfully argued that Housand's subsequent recantation rendered his previous testimony, including that before the grand jury, perjurious. Such a proposition has no basis in law or in fact. Initially we again note that Housand has since been convicted on charges stemming from his false recantation. Thus the grand jury which indicted him (Crim. No. H-75-40) and the petit jury which convicted him both made the determination that Housand's

substantive testimony before the special grand jury and at appellants' initial trial was truthful. It should also be noted that at his recent trial on the recantation charges, Housand testified that his recantation was false and he reiterated the truthfulness of his original testimony before the special grand jury. Moreover, Housand's sworn testimony before the grand jury and at appellants' initial trial, even through recanted, could have been admitted as substantive evidence against appellants at a latter trial had Housand testified at that trial. Rule 801(d)(1)(A), F. R. Evid.; see also California v. Green, 399 U.S. 149 (1970); United States v. DeSisto, 329 F.2d 929 (2nd Cir. 1964), cert. denied, 377 U.S. 979 (1964). Clearly, appellants' challenge to Housand's grand jury testimony as perjurious is unconvincing.

Moreover, neither this Circuit's decision in United States v. Estepa, 471 F.2d 1132 (2nd Cir. 1972), nor the decisions in United States v. Basurto, 497 F.2d 781 (9th Cir. 1974), and United States v. Gallo, 394 F. Supp. 310 (D. Conn. 1975), require the result appellants urge. In Estepa this Court held that an indictment is defective where hearsay evidence is presented to the grand jury and the prosecutor misleads the grand jurors to believe that they are receiving first-hand knowledge or when there is "a high probability that with eyewitness rather than hearsay testimony the grand jury would not have indicted." United States v. Estepa, supra, 471 F.2d at 1137. As later noted in United States v. Harrington, 490 F.2d 487, 489 (2nd Cir. 1973), Estepa's thrust was

> [i]ntended as manifest warning that it is impermissible to have law enforcement officers who have no first-hand knowledge of the subject the grand jury is investigating testify as if they possessed that knowledge.

Plainly the prohibition of Estepa is not involved here, for the grand jury heard the first-hand testimony of a participant in the conspiracy and not the undisclosed hearsay testimony of a law enforcement officer. The holding in Estepa is precise; from it one cannot justifiably extrapolate the proposition that once a grand jury has determined probable cause, a superceding indictment must be sought merely because the testimony of a second witness with direct knowledge of a criminal enterprise becomes available.

United States v. Busurto, supra, and United States v. Gallo, supra, are equally inapposite. Those cases involved the duty of the prosecutor to resubmit evidence to a grand jury when he became aware that a previously returned indictment was permeated with perjury. In Busurto the witness, having testified as to a conspiracy which spanned a ten-month period, later admitted that he had no direct knowledge as to the first three months of the conspiracy's operation and that his testimony regarding that was false. In Gallo the witness admitted that he had fabricated his testimony concerning the defendant's presence at a conspiratorial meeting. In both cases the government was required to resubmit its evidence to the grand jury because the "indictment w[as] permeated with perjurious statements as to crucial, material events."

United States v. Gallo, supra, 394 F. Supp. at 315. Here, by contrast, there is no showing that Housand perjured himself in any way before the grand jury, let alone in a material respect. As shown above, Housand's perjury occurred only at trial and was limited to a matter of credibility. Thus, the instant indictment was not permeated with perjury, and by stating the rule in Busurto and Gallo, appellants make clear that they cannot avail themselves of it.

B. WHEN APPELLANTS' INITIAL CONVICTIONS WERE VACATED BECAUSE OF ERROR IN THAT TRIAL, THE PROPER REMEDY WAS A NEW TRIAL AND NOT DISMISSAL OF THE INDICTMENT

During the pendency of the appeal following appellants' convictions at the initial trial, the case was remanded to the district court for a hearing on appellants' motions for a new trial. Judge Clarie found that Housand had given perjurious testimony at that trial regarding his history of psychiatric treatment and that the government had not produced all of the materials required under Brady v. Maryland, 373 U.S. 83 (1963). As a result, Judge Clarie ordered a new trial.

In a rather protracted argument (Brief, 82-93), appellants offer the novel claim that Judge Clarie ought to have dismissed the indictment against them rather than ordering a new trial. However, a new trial is the proper remedy where error is found after guilty verdicts have been returned against. See, e.g., Giglio v. United States, 405 U.S. 150 (1972). Contrary to appellants' argument, such a remedy in no way implicates the

the Fifth Amendment prohibition against double jeopardy. In recently recognizing that "the Double Jeopardy Clause will present no obstacle to a retrial if the conviction is set aside by the trial judge or reversed on appeal" [United States v. Dinitz, No. 74-928 (Decided, March 8, 1976) slip op. at 10], the Supreme Court stated:

> This Court's decisions permitting retrials after convictions have been set aside at the Defendant's behest clearly indicate "that the Defendant's double jeopardy interests, however defined, do not go so far as to compel society to so mobilize its decision making resources that it will be prepared to assure the Defendant a single proceeding free from harmful governmental or judicial error. United States v. Jorn [400 U.S. 470, 484 (1971)]." Id. at 10 n. 13. 13/

13/ We note that appellants have taken an ambulatory position throughout their brief on whether or not jeopardy has attached. While this argument is hinged on a contention that jeopardy had attached, appellants argue in contending that a superceding indictment should have been obtained because Housand allegedly perjured himself before the grand jury--that jeopardy had not yet attached following the granting of a new trial (Brief, 80).

III

JOOST AND GUILLETTE WERE PROPERLY TRIED TOGETHER

Although Joost did not challenge the propriety of the initial joinder, he contends that he was prejudiced by the introduction of two post-conspiratorial statements made by Guillette and that his motion for severance prior to this trial should therefore have been granted. Rule 14, F. R. Crim. P. Specifically, Joost cites the introduction of Marrapese's testimony relating to the episode at Amando's Restaurant (supra, n. 10 at p. 13) and testimony of the pilot, Roger Williams, as to a conversation with Guillette following LaPolla's death (supra, n. 8 at p. 10) as violative of the rule in Bruton v. United States, 391 U.S. 123 (1968). The record, however, belies Joost's claim of prejudice, for the post-conspiratorial statements did not implicate him and were admitted only against Guillette.

Merely because a conspiracy has ended, "[i]t does not necessarily follow that acts and declarations made" thereafter are inadmissible. Lutwak v. United States, 344 U.S. 604, 617 (1953). The rule was thus stated:

> Relevant declarations or admissions of a co-conspirator made in the absence of the co-conspirator and not in the furtherance of the conspiracy, may be admissible in a trial for conspiracy against the declarant to prove the declarant's participation therein. The court must be careful at the time of admission and by its instructions to make it clear that the evidence is limited as against the declarant only. Id. at 618 (emphasis in the original).

And, as this Court has recognized, "Bruton has no application" to this general rule of admissibility when "hearsay utterances of a defendant ... do not inculpate a co-defendant." United States v. Lobo, 516 F.2d 883 (2nd Cir. 1975), cert. denied, No. 74-1580 (October 6, 1975).

Neither of Guillette's post-conspiratorial statements were in any way inculpatory as to Joost. Both Marrapese and Williams testified to the full substance of Guillette's statements and there was no reference, directly or indirectly, to Joost's involvement in the conspiracy to kill LaPolla. Indeed, appellant Joost might have argued that Guillette's statements at Amando's Restaurant indicating that Guillette, Sitko, and "Red" Houle had killed LaPolla, exculpated him. Finally, at the time each of the post-conspiratorial statements was admitted, the court carefully instructed that jury that the evidence was admissible only as to Guillette and could not be considered against the other co-defendants (Tr. II, 6; Tr. V, 154). Again in its final instructions, the court charged the jury that "[t]he guilt or innocence of each defendant must be determined separately with respect to him solely on the evidence presented against him" and that the evidence admitted only against Guillette could not be considered in determining the guilt of any other defendant (Tr. X, 115-116).

In light of the clear admissibility of these post-conspiratorial statements against Guillette, the failure of those statements to in any way inculpate Joost, and the court's proper limiting instructions, the trial court did not abuse its discretion in denying Joost's motion for severance. See, United States v. Wingate, 520 F.2d 309, 313-314 (2nd Cir. 1975), cert. denied, No.75-5545 (January 19, 1976); United States v. Papadakis, 510 F.2d 287, 300 (2nd Cir. 1975), cert. denied, 421 U.S. 950 (1975); United States v. Fleming, 504 F.2d 1045, 1050 (7th Cir. 1974) (Stevens, J.); Posey v. United States, 416 F.2d 545, 550-551 (5th Cir. 1969), cert. denied, 397 U.S. 946 (1970).

IV

JOOST'S PRIOR ACQUITTAL OF USING AN EXPLOSIVE DEVICE TO OBSTRUCT JUSTICE DID NOT COLLATERALLY ESTOP THE GOVERNMENT FROM PROVING AT THE INSTANT TRIAL THAT JOOST WAS A MEMBER OF THE CONSPIRACY TO DEPRIVE LaPOLLA OF A CIVIL RIGHT AND WHICH RESULTED IN LaPOLLA'S DEATH

Joost was charged in each count of the three count indictment charging a conspiracy which resulted in a federal witness' death, obstruction of justice by force and violence, and using an explosive device in the commission of a felony. In the prior trial of this case before Judge Newman, the jury was unable to reach a verdict on the conspiracy count but acquitted Joost on each of the two substantive counts. Joost maintains that the jury below might properly have convicted him of simple conspiracy, but not a conspiracy which resulted in LaPolla's death, because a jury in a previous trial -- which had been instructed on the theories of joint venture and conspiracy -- acquitted him of intimidating LaPolla by force or violence on September 29, 1972, or of using an explosive device to effect this intimidation.

Of course, the doctrine of collateral estopped is available to a criminal defendant [E.g., Ashe v. Swenson, 397 U.S. 436 (1970)], but only if "an issue of ultimate fact or an element essential to conviction [was] . . . necessarily . . . determined in favor of the defendant by a valid and final judgment in a prior proceeding between the same parties." United States v. Cala, 521 F.2d 605, 607-608 (2nd Cir. 1975). When the claim is raised and a previous judgment of acquittal

was based on a general verdict, a court is required to

> "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." Ashe v. Swenson, supra, 397 U.S. at 444, quoting from Mayers & Harbourgh, Bis Vexari; New Trials and Successive Prosecutions 74 Harv. L. Rev. 1, 38-39.

When the jury verdicts at the prior trial are analyzed in light of Judge Newman's jury instructions, it is apparent that Joost's acquittal on the substantive counts did not necessarily foreclose from consideration whether he was a member in a conspiracy which resulted in LaPolla's death. In his conspiracy charge, Judge Newman specifically instructed that the jury could not convict any of the defendants unless it first found beyond a reasonable doubt that the May 8 meeting occurred and conversely that if that meeting was found not to have occurred, it must acquit the defendants of conspiracy. The jury was also instructed that if the May 8 meeting was found to have occurred, it might convict any defendant of that conspiracy if it also found all the other necessary elements had been established beyond a reasonable doubt. (App., 225-226). The jury was also told that they could aquit the defendants of the conspiracy with death resulting and the substantive counts, but still convict of simple conspiracy if the May 8 meeting was established beyond a reasonable doubt (App., 229-230).[14/]

14/ It is unclear why Judge Newman instructed erroneously--in our view--that the jury was required to find beyond a reasonable doubt that the May 8 meeting occurred. (CONT'D)

Thereafter, the court instructed that the counts charging intimidation of a witness and use of an explosive device were substantive counts and that each defendant was alleged to have actually committed these acts on September 29, 1972 (App., 232-234, 238-239). Judge Newman went on to instruct that it was not necessary that the jury find that a particular defendant personally committed the charged acts; guilt could also be predicated on a finding that a defendant was a member of a joint venture or a conspiracy if a fellow joint venturer committed the charged acts or if the acts were committed in the furtherance of the conspiracy (App., 234-236, 239-240). But before the jury could employ either of these latter theories in determining guilt, Judge Newman added this qualification: the jury could only use the joint venture or conspiracy theory if it first found beyond a reasonable doubt that the May 8 meeting at Carter's Jewelry took place. On the other hand, if that meeting was not found to have occurred, then the jury could convict on the substantive count based only on the independent evidence of what each particular defendant did on September 29 (App. 236-240).

Joost's claim only serves to highlight the "most difficult" burden a criminal defendant bears when collateral

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14/ (CONT'D) Section 241 does not require proof of an overt act [United States v. Morado, 454 F.2d 167, 169 (5th Cir. 1972), cert. denied, 406 U.S. 917 (1972)] and none was alleged in the indictment.

estoppel is raised since it cannot usually be determined with certainty the grounds upon which the previous jury reached its general verdict. United States v. Gugliaro, 501 F.2d 68, 70 (2nd Cir. 1974); see also, United States v. Cioffi, 487 F.2d 492, 498 n. 8 (2nd Cir. 1973), cert. denied sub. nom. Cizuio v. United States, 416 U.S. 995 (1974). It can be said that the previous jury's acquittal of Joost on the two substantive counts embodied a determination that the government failed to introduce sufficient independent evidence to prove beyond a reasonable doubt that Joost personally participated in the criminal events of September 29, 1972. It cannot be said with certainty, however, that Joost's acquittal on these counts necessarily encompassed a determination that he was not a member of a conspiracy to deprive LaPolla of a civil right and which resulted in LaPolla's death.

The verdict pattern at the previous trial is most reasonably the result of an inherent ambiguity in Judge Newman's jury instructions. On the conspiracy count the jury was told that they could convict the defendants if, and only if, occurrence of the May 8 meeting was established beyond a reasonable doubt. The jury was unable to reach a verdict as to appellants on the conspiracy count, either as to simple conspiracy or with death resulting. Obviously the jurors were in fundamental disagreement as to whether or not the May 8 meeting took place.

On the susbstantive counts Judge Newman told the jury that it could not convict any defendant unless it found that the May 8 meeting occurred or unless there was sufficient independent evidence against that defendant alone. However, the jury was not instructed concerning the a stalemate on Count I would have on the resolution of Counts II and III. Most logically, as in their deliberations on Count I, the jury was unable to decide whether the May 8 meeting occurred and, hence, whether they could apply the conspiracy or joint venture theories in determining guilt on the substantive counts. Consequently, the jury most likely moved to the next theory--independent evidence--and acquitted Joost.

Assuming a "rational jury" (Ashe v. Swenson, supra), we submit that Joost's acquittal on the substantive counts is attributable to the likely impression left by the court's instructions that if there was insufficient independent evidence to establish defendant's direct participation in the acts charged in the substantive counts, then an acquittal was required unless the jury also convicted on the conspiracy count or at least concluded that occurrence of the May 8 meeting had been established beyond a reasonable doubt. Given Joost's inability to demonstrate with certainty what the jury's verdict necessarily decided (United States v. Gugliaro, supra), this is not the "rare situation in which the collateral estopped defense will be available to a defendant."

United States v. Tramunti, 500 F.2d 1334, 1346 (2nd Cir. 1974), cert. denied, 419 U.S. 1079 (1974).[15/]

15/ The fact that the same evidence was introduced at the trial before Judge Newman and the trial below is not the critical consideration in determining whether collateral estopped is to be applied. See, United States v. Barket, 530 F.2d 181, 188 (8th Cir. 1975).

V

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN LIMITING THE CROSS-EXAMINATION OF MARRAPESE

It is axiomatic that the trial judge has broad discretion in restricting both the scope and length of cross-examination. See, e.g. United States v. Green, 523 F.2d 229, 237 (2nd Cir. 1975); United States v. Kahn, 472 F.2d 272, 281 (2nd Cir. 1973), cert. denied, 411 U.S. 982 (1973). And although a court may not completely preclude cross-examination as to a witness' motive for testifying [United States v. Hagget, 438 F.2d 396 (2nd Cir. 1971), cert. denied, 402 U.S. 946 (1971)], defense counsel does not have a boundless right to inquire into a government witness' possible motives and biases. United States v. Blackwood, 456 F.2d 526, 530-531 (2nd Cir. 1972), cert. denied, 409 U.S. 863 (1972). Thus, "[i]f the jury is otherwise in possession of sufficient information concerning the witness' possible motives for testifying falsely in favor of the government, there is no abuse of discretion if a judge restricts the cross-examination of a government witness." United States v. Turcotte, 515 F.2d 145, 151 (2nd Cir. 1975), cert. denied, sub nom. Gerry v. United States, No. 75-398 (December 15, 1975). See also, United States v. Mahler, 363 F.2d 673, 677 (2nd Cir. 1966). The record clearly demonstrates that no such abuse of discretion occurred below.

a. On direct examination Marrapese admitted that he had been convicted for his participation in a conspiracy which

resulted in the death of LaPolla, and that although he had originally been sentenced to life imprisonment, his sentence was reduced to six years' imprisonment after he became a government informant (Tr. I, 98-100). Thereafter an extensive cross-examination ensued[16/] which thoroughly attacked Marrapese's credibility and explored his motivation for testifying

Under cross-examination, Marrapese admitted that he had also been convicted for transporting the stolen M-16s across state lines. Marrapese said that he had perjured himself when he testified at the M-16 trial (Tr. II, 12-13, 37), and that he had lied to Judge Clarie when he was sentenced on the M-16 charge (Tr. II, 51-53). Asked about his business dealings, Marrapese said that AUGB was a front for a large scale fencing operation (Tr. II, 14-16) and that he filed false tax returns to mask gross incomes that reached $2.5 million (Tr. II, 16-18). Candidly, Marrapese assessed his adult life as one of "deceipt, fraud, and deception" (Tr. II, 19-20).

Although already cooperating with federal agents at the time, Marrapese said that he may have asked Bucci in April, 1975 to assess the grounds on which Marrapese might

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16/ Over 200 pages of the transcript were devoted to Marrapese's cross-examination.

be awarded a new trial (Tr. II, 92-93). Marrapese further admitted that his original life sentence had been reduced only the day before he had first testified against appellants (Tr. II, 106-107). He also conceded that his cooperation with federal officers had been less than honest on occasion, and that when he had first told the agents about the meeting at Amendo's he knowingly placed the date of the meeting on a day when he knew Amendo's was closed because he did not trust the agents (Tr. II, 69, 85). Moreover, Marrapese admitted that he did not mention the May 8 meeting until late December, 1974, having previously denied its occurrance (Tr. II, 24, 78, 88). Marrapese also conceded that in a taped conversation with LaPolla, he had discussed dynamiting the Brooklyn, Connecticut jail in order to eliminate a witness incarcerated there (Tr. II, 152-153).

In addition to cross-examination, appellants presented five witnesses who testified as to Marrapese's motivation and his propensity to fabricate. Officer Veillette testified concerning an interview which he and another officer conducted with Marrapese during the investigation into LaPolla's death. [A tape of this interview which Marrapese had surreptitiously recorded was played for the jury (Tr. IX, 42-73)]. During the interview Marrapese, who had not yet been indicted for conspiring to deprive LaPolla of a civil right, told the officers, "you guys tell me something I don't go to the can, I'll set them [appellants] up any way you want

me to" (Tr. IX, 48). Thomas Zinni, an attorney and defendant Zinni's brother, recounted two discussion of similar import which he had with Marrapese following the latter's indictment on the conspiracy charge. According to Thomas Zinni, Marrapese wanted to coordinate a story between himself and Zinni's brother in their conspiracy trial and Marrapese said that he would "give them [the government] anybody they want" (Tr. VI, 36-42). Subsequent to his conviction on the conspiracy charge, Marrapese reportedly told Thomas Zinni that he was not "going to do a life bit" and that he would implicate Bucci in the conspiracy in return for a ten year sentence (Tr. VI, 42-44). Three prisoners with whom Marrapese was incarcerated in a federal penitentiary testified to various aspects of plan Marrapese supposedly devised to get a reduction of his life sentence. In sum, these witnesses said that Marrapese planned to bargain for a reduced sentence in return for cooperation and then recant his testimony as falsely given once his sentence was reduced (Tr. VII, 46-48, 66-67, 77-81).

b. At a conference in chambers, appellants made an offer of proof as to why they should be allowed to explore the area of Housand's previous recantation as part of their cross-examination of Marrapese (Tr. III, 3-20).[17/] Appellants

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17/ Housand was subsequently called as a defense witness out of the presence of the jury; he invoked his privilege against self-incrimination. At the time he was under indictment for making false statements and obstructing justice in connection with his recantation in this case (Tr. VII, 11-16). Housand has since been convicted on both counts after a (CONT'D)

sought to show that even after Housand recanted, Marrapese was not assured of a new trial. Therefore, in order to provide valuable cooperation in return for a favorable recommendation for reduction of sentence, Marrapese told federal agents that he had paid Bucci's law partner, John O'Neill, $7,000 to purchase Housand's allegedly false recantation.[18/] Thus, by appellant's theory, even if no new trial was ordered, Marrapese could manuever for a reduce sentence by incriminating Housand and Bucci. In addition, appellants sought to introduce selected portions of Housand's testimony at their original trial to show how Marrapese arrived at the date and time of the May 8 meeting and to show inconsistencies between Housand's version of the meeting and Marrapese's testimony at the instant trial.

In response to appellants' offer of proof, the government pointed out that Housand's testimony at the previous proceedings encompassed several thousand pages of testimony (Tr. II, 225), and noted that if selected pieces of evidence relating to the recantation were introduced by appellants, the government would want to introduce other evidence sufficient to rehabilitate both Housand and Marrapese (Tr. III, 22). Thereafter the court denied appellants' request, ruling:

17/ (CONT'D) trial in which he admitted that his recantation was false and affirmed the testimony which he had given at appellants' initial trial before Judge Clarie.

18/ Marrapese did tell federal agents, as well as the grand jury, that he had purchased Housand's recantation with $7,000 he gave to O'Neill. Appellants contend this information was false and that the $7,000 constituted payment of a legitimate legal fee.

> We get into the question of knocking down or corroborating Housand's testimony with whether he was nuts or whether he wasn't, we get into the question of knocking down or corroborating Marrapese's testimony on the bribe, whether it was a legal fee, whether it was a bribe, and I think now that I have understood this thing in its context that while there can be no question of its materiality, nevertheless, in overall effect it is cumulative, and it's probative value on the issue of impeachment, and that's the only place it goes, it seems to me is far outweighed by the confusion, the misleading nature of it, and the delay in this trial, it seems to me it would push the limits of this trial beyond anything a jury reasonably should be expected to digest. This trial is already confusing and complicated by the fact that we have had three other trials, by the fact that we have had these witnesses, particularly the principal witness, Marrapese, who has given, to say the least, a multitude of inconsistent statements, who has psychiatric problems, [and] who has motive to fabricate. . . . (Tr. III, 24-25).

c. It is clear that Judge MacMahon soundly exercised his discretion in this regard. Such a limitation on the scope of cross-examination is specifically envisioned by Rule 403, F. R. Evid., which provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. 19/

19/ This Rule is further buttressed by Rule 611(a)'s directive that

> The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to... (2) avoid needless consumption time. . . ."

That the proffered evidence was relevant is not determinative of its admissibility either under Rule 403 or this Court's decisions. See, United States v. Ravich, 421 F.2d 1196, 1204 (2nd Cir. 1970), cert. denied, 400 U.S. 834 (1970). Rather, the critical test is the tendency of the proffered evidence to confuse, mislead, or delay proceedings, especially when the presentation of the evidence would be cumulative in nature. The factors requiring exclusion are compelling here[20/] for the introduction of the evidence could only have temded to improperly "open up a trial within a trial." United States v. Bowe, 360 F.2d 1, 16 (2nd Cir.1966), cert. denied, 385 U.S. 961 (1966).[21/]

On point with instant case is this Court's recent decision in United States v. Pacelli, 521 F.2d 135, 137-140 (2nd Cir. 1975). In Pacelli one Barry Lipsky, a member of a similar conspiracy which resulted in the death of a witness, testified against a co-conspirator. Like Marrapese, Lipsky's past activities, as revealed to the jury, constituted a "litany of . . . licentious behavior" which included prior felony convictions, schemes to defraud, and perjury. In addition, Lipsky conceded that his testimony on behalf of the prosecution was prompted by an expectation of leniency in his own case.

20/ During arguments before the court below, Guillette's counsel candidly recognized that inquiry into Housand's recantation "could open a Pandora's Box" (Tr. III, 23).

21/ Illustrative of the legal and factual intricacies surrounding the proffered evidence, is the fact that Housand's recently concluded trial for his false recantation lasted approximately two weeks.

Despite this extensive impeachment, Pacelli contended that the trial judge limited the scope of cross-examination of Lipsky with respect to his testimony in a prior narcotics trial which allegedly falsely implicated Pacelli. This Court rejected this claim as "insubstantial and unconvincing" since the witness' "vulnerability had already been exposed" so thoroughly in the same area, observing as follows:

> [W]e deem it well within the discretion of the trial judge for him to have avoided the sidetracking which would inevitably have resulted in diverting the jury from the issue of Pacelli's guilt to what, in effect, would have constituted a separate fact-finding venture * * *.

521 F.2d at 138.

At the trial below, Marrapese's credibility was thoroughly explored, both generally and on the specific issue of his motivation and possible bias. Thus, the same rational applied in Pacelli is applicable here, and the trial co[illegible] restriction on the scope of cross-examination was clearly warranted.

VI

THE TRIAL COURT PROPERLY EXCLUDED UNSUBSTANTIATED HEARSAY TESTIMONY THAT ONE ANTHONY SOUCA KILLED LaPOLLA

In January, 1973 a confidential informant told federal agents about a conversation which he had with one Anthony Souca (phonetic) in a New York night club -- "the Crossroads, or something"--which was located on Nimrod Street in Queens (Dec. 3 Hearing, 10, 14-15).[22/] At the time of the conversation, the confidential informant was intoxicated and Souca was "drinking freely" (Dec. 3 Hearing, 17). After the informant had "gained [Souca's] confidence," Souca disclosed that he had "bl[own] up" LaPolla by planting a bomb at the front door of LaPolla's home and that he had done this for Marrapese (Dec. 3 Hearing, 16-17). Souca did not reveal who, if anyone, had helped him plant the bomb nor did he say whether Marrapese was acting alone or in conjunction with anyone else (Dec. 3 Hearing, 18). Moreover, Souca conveyed no information of any sort which could have substantiated the claim that he

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22/ "Dec. 3 Hearing" refers to the transcript of the in camera testimony of the informant before Judge Clarie on December 3, 1973.

killed LaPolla (Dec 3 Hearing, 25).

Apart from speaking to Souca on two occasions at the Crossroads Lounge, the informant had never seen Souca (Dec. 3 Hearing, 15-16, 19). Although the informant provided a general physical description of Souca, he did not know where Souca lived, how Souca could be located, or if in fact "Souca" was the declarant's real name (Dec. 3 Hearing, 18-21). Judge MacMahon found the Souca conversation to be "blatant hearsay" and precluded the defense from introducing it (Tr. VI, 135).[23/]

While the hearsay statements of an unavailable declarant which are against his penal interest have traditionally been inadmissible at trial [See, Donnelly v. United States, 228 U.S. 243, 272-277 (1913); United States v. Matlock, 415 U.S. 164, 176-177 (1974)], the Federal Rules of Evidence have abrogated the traditional prohibition for most purposes. See, Rule 804(b)(3), F.R. Evid. However, even under the liberalized format of these Rules, it is clear that the Souca conversation was properly excluded, for Rule 804(b)(3) conditions the admissibility of "statement[s] tending to expose the declarant to criminal liability and offered to exculpate the accused" upon a showing of "corroborating circumstances

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23/ At appellants initial trial, Judge Clarie also denied admission of the Souca conversation. By contrast, Judge Newman allowed the introduction of an expurgated version of the informant's testimony at a subsequent trial.

clearly indicat[ing] trustworthiness of the statement". Although it is by no means clear that the Souca statement is exculpatory as to appellants, it is clear that no circumstances have been shown which corroborate the trustworthiness of the statement to warrant its admission.[24/]

In assessing whether the Souca statement was cloaked with adequate assurances of trustworthiness, the decision in Chambers v. Mississippi, 410 U.S. 284 (1975), is instructive. There the accused was charged with murdering a police officer and the evidence adduced at trial showed that only one person had been involved in the murder. At his trial Chambers unsuccessfully attempted to introduce the testimon_ of three witness to whom one Gable McDonald had admitted that he, not Chambers, had killed the officer. The Supreme Court reversed Chambers' conviction and held "under the facts and circumstances of the case" that McDonald's inculpatory statements "provided

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24/ In recognizing the general admissibility of statements against penal interests, Congress found that "statements of this type tending to exculpate the accused are more suspect" in nature. Thus, Congress found the Supreme Court's proposal that admissibility of such declarations be predicated on a showing of simple corroboration to be "ineffective" to guarantee reliability. Instead, Congress made such declarations tending to exculpate the accused generally inadmissible "unless corroborating circumstances clearly indicate the trustworthiness of the statement." See, H.R. Rep. 93-650 at 16, 93rd Cong., 1st Sess (November 15, 1973).

considerable assurance of their reliability." Id., at 300, 303. In reaching this finding of reliability, the Supreme Court based its decision on the following: (1) McDonald's incriminating statements had been made on three separate occasions, each to a close acquaintance and each within one day of the murder; (2) the statements were corroborated by other evidence which placed McDonald at the murder scene with a gun in his hand and which showed that McDonald had owned a pistol similar to the one used in the slaying; (3) the statements were clearly inculpatory; and (4) McDonald was available as a witness at trial. Id. at 300-301.

Against this background, it is clear that the instant statement lacked the degree of trustworthiness to support its admissibility. First, the record reveals that the relationship of Souca to the informant was merely that of a barroom confidant. Apart from a chance meeting at the Cross-roads Lounge, the informant had no knowledge of Souca and there was no reason why Souca would impart information to the informant which, if true, could subject Souca to a potential sentence of life imprisonment. Moreover, the informant was intoxicated when he spoke with Souca, and Souca was drinking freely, factors which militate against a finding of reliability. See, United States v. Sheard, 473 F.2d 139, 149 (D.C. Cir. 1972). Additionally, the informant was also intoxicated when he relayed the Souca conversation to the federal agents (Dec. 3 Hearing, 11-12).

There is, moreover, a lack of independent evidence to corroborate Souca's statement. Unlike the Chambers situation, no evidence places Souca in Oneco at the time of the explosion or shows that Souca possessed the skills and materials necessary to construct and plant a bomb. Indeed, there is no evidence to corroborate Souca's existence. Although appellants present photographic evidence that the Crossroads Lounge exists, this evidence hardly provides an indicia of reliability with respect to the informant's story. It does not show that the informant ever met Souca nor does it in any manner corroborate the alleged statement by Souca.

Contrary to appellants' contention (Brief at 58-59), Officer Veillette's account of a January 2, 1973 interview with Marrapese does not supply the clear corroboration which Rule 804(b)(3) requires. In that interview Marrapese alluded to a bar in New York which might have some connection to the investigation into LaPolla's death (Tr. IV, 73-74, 94). But Marrapese never identified the bar by name or location and neither indicated who had been responsible for LaPolla's death nor where the bomb was constructed (Tr. IV, 74, 100-101). Given its inherent ambiguity, Marrapese's statement to Officer Veillette cannot be construed as satisfying Rule 804(b)(3)'s corroboration test.[25/] Thus the Souca statement,

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25/ We note that this interview antedated Marrapese's cooperation with law enforcement officers. Thus, Marrapese's statements inferring that he might know who manufactured the bomb is most reasonably read in context with the testimony he gave at trial that Guillette, Edward Sitko, and "Red" Houle planted the bomb.

which was not made under circumstances indicating truth-worthiness and lacked independent corroboration, was properly excluded by the court. See, United States v. Wingate, 520 F.2d 309 (2nd Cir. 1975), cert. denied, No. 75-5545 (January 19, 1976).

Finally Souca's statement is not exculpatory as to appellants. The government's proof at trial showed that a conspiracy had been responsible for LaPolla's death. Souca did not say that he had acted alone in planting the bomb, that he had constructed the bomb himself, or that Marrapese was acting alone in hiring him. Although the statement was incriminatory as to Souca, it was not necessarily inconsistent with appellants' guilt, and therefore appellants were not harmed by its exclusion. See, United States v. Marquez, 462 F.2d 893, 895-896 (2nd Cir. 1972); 462 F.2d 893, 895-896 (2nd Cir. 1972); Compare, Chambers v. Mississippi, supra, 410 U.S. at 297.[26/]

26/ Appellants blame the government for Souca's absence at trial. However, the existence of the informant and what he knew was disclosed to the defense on October 23, 1973, prior to the commencement of the first trial. In affidavits on December 11 and 27, 1973 the government set forth its efforts to locate Souca (App., 353-356). Moreover, even after the first trial the government persisted in its efforts to locate Souca. Thus in a July 29, 1975 letter to Judge Newman (copies to defense counsel) government counsel stated:

> Special Agent Salvatore Petrella of the Alcohol, Tobacco and Firearms Bureau of the Department of the Treasury has continued on my instructions to attempt to determine if Anythony Souca (phonetic) exists. You will recall that an informant told A.T.F. agents in early 1973 of a conversation he had with (CONT'D)

VII

THE TRIAL COURT PROPERLY REJECTED APPELLANTS' REQUEST FOR AN ALIBI CHARGE

At trial both appellants testified and specifically denied that they had been present at Carter's Jewelry on the

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26/ (CONT'D) Souca which allegedly concerned the LaPolla killing.

> The record of Providence, Rhode Island Police Department disclosed records of two individuals named Anthony Souza. One was serving a life sentence at the Cranston, Rhode Island Adult Correctional Institute prior and during the time of the alleged conversation. The photograph of the other Souza was shown to the informant with negative results.
>
> The records of the Federal Bureau of Investigation were checked to determine there were any records of an Anthony Souca (or Sousa or Souza) who fit the general description given by the informant (25-35 years old) and who was from the Providence or New York City area. The results were negative. Photographs of fifteen individuals (coutsey of the Department of Motor Vehicles) in the State of Rhode Island who had the name Anthony Souca and who fit the general description given by the informant were shown to him. The results were negative. I would request that this be made a part of the court's file.

We sugmit that the government has acted in good faith in the efforts to locate Souca, even though the government's legal obligation to the defense ended when it was given the same information that the government possessed with respect to who Souca was, what he knew, where the informant had seen him.

morning of May 8 (Tr. VII, 119-120; Tr. VIII, 49). This directly contradicted Marrapese's testimony (supra, pp. 6-7) that appellants had been present when an agreement was reached to pay Housand $5,000 to kill LaPolla. To corroborate Guillette's testimony on this point, Meryle Wheeler, Guillette's brother-in-law testified that Guillette and his fiance had stayed at his home the night of May 7 (Tr. VI, 25), but that he had left for work at 7:00 a.m. and could not account for Guillette's whereabouts on the morning of May 8 (Tr. VI, 33). Guillette's present wife, who was his fiance on May 8, testified that she and Guillette had been asleep until about 11:00 a.m. on May 8 and that Guillette did not leave the Wheeler house until after noon (Tr. VI, 241-245, 249, 252-253). For his part, Joost could only recall that he had seen Marrapese in court on the morning of May 8 (Tr. VIII, 152) and that he had been at Bucci's office at noon on that day (Tr. VIII, 49).

Based on the foregoing, appellants requested that the jury be instructed that if there was "a reasonable doubt as to whether a defendant was at the meeting at Carter's jewelry store on May 8, you must find that defendant not guilty of

Count One [conspiracy] . . . ." (App., 267).[27] Appellants, however, were charged in a conspiracy which was formed in early May, 1972 and continued until LaPolla's death nearly five months later. To be sure, Marrapese's account of the May 8 meeting was an important element in the government's chain of proof, but even without the May 8 meeting there was sufficient evidence offered to support appellants' membership in the conspiracy.[28] Although it is unlikely that the jury would

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27/ In its entirety, the requested instructions provided:

> Evidence has been introduced by some of the defendants to show that on the morning of May 8, 1972, they were at a location other than Carter's jewelry store. Guillette testified he was at the home of his brother-in-law, and Joost testified he was at his own home. I remind you that a defendant never has the burden of proving his innocence. If, after considering all of the evidence, you have a reasonable doubt as to whether a defendant was at the meeting at Carter's jewelry store on May 8, you must find that defendant not guilty of Count One, and you would not be able to use the joint venture or conspiracy theory in convicting that defendant on Counts Two or Three (App. at 267).

28/ Appellants make much of Judge Clarie's new trial order wherein he stated that "[w]ithout that [May 8] meeting it would have been difficult, if not impossible, to prove that all four [defendants] had agreed to do away with LaPolla, as set out in Count 1 of the indictment" (Br. 37). However, Judge Clarie's assessment of the importance of the May 8 meeting was based on the evidence as presented through Housand at appellants' initial trial over which Judge Clarie presided. Housand's involvement with the conspiracy terminated when he left Rhode Island that same month, and therefore his knowledge of the ongoing conspiracy ended shortly after the May 8 meeting. By contrast, Marrapese remained an active member of the conspiracy throughout the summer of 1972 and was able to provide additional evidence as to appellants' involvement in the conspiracy. As such, the critical importance which Judge Clarie attached to the May 8 meeting was substantially diminished in light of Marrapese's more comprehensive testimony.

disbelieve Marrapese with respect to the May 8 meeting, but believe him as to subsequent conspiratorial activities, it was nevertheless not the trial court's perogative to remove from the jury its right to accept some parts of the witness' testimony while rejecting other parts. United States v. Weinstein, 452 F.2d 704, 713-714 (2nd Cir. 1971). See also, United States v. Edwards, 488 F.2d 1154, 1157-1158 (5th Cir. (1974).

On May 9 and 10, Marrapese met separately with Guillette and Joost. During these meetings Marrapese conveyed Bucci's advice to refrain from killing LaPolla until the strength of the government's M-1 case could be assessed and appellants agreed. As an alternate course of conduct, Marrapese advised appellants that he would continue to look for LaPolla and prevent his testimony either through bribery or by "whack[ing] him around." Appellants concurred in this plan and thus, apart from the May 8 meeting, evidence was introduced which, if believed by the jury, would support appellants' convictions for conspiracy to deprive LaPolla of a federal civil right. So too, Marrapese's account of various meetings during the July-September period offered support for appellants' conspiracy convictions. It was at such meetings that Marrapese came under criticism for his failure to locate LaPolla and that Guillette admonished that if Marrapese failed to locate LaPolla, it would be necessary to "dump this guy [LaPolla) and get him out of the way." Marrapese's testimony regarding these post-may 8 meetings, together

with evidence of appellants' efforts to locate LaPolla, were sufficient to prove their membership in the conspiracy. While the "alibi" evidence proffered by appellants may have controverted Marrapese's testimony concerning the May 8 meeting, it did nothing to negage the substantial proofs that appellants may have joined the conspiracy after the May 8 meeting. Therefore, the trial court properly refused to give the requested instruction. See, United States v. Lee, 483 F.2d 968 (5th Cir. 1973); United States v. Cole, 453 F.2d 902, 906 (8th Cir. 1972).[29/]

29/ This Court's decision in United States v. Burse, No. 75-1388 (March 8, 1976) is distinguishable. As this Court noted in Burse, an alibi instruction is not required "when the defendant's presence at the scene of the crime has not been an element of the offense which the government was required to prove...." (slip op. at 4). Burse was charged with conspiring to rob a bank and the substantive offense; he was acquitted of the bank robbery but convicted on the conspiracy count. In ruling "on the facts of the[e] case, [that] Burse was entitled to an alibi instruction" this Court reasoned:

> [W]hile Burse was acquitted on the substantive counts and while his presence at the scene of the crime was not necessary for his conviction, the prosecution's theory of the case rested heavily on Burse's alleged presence at the scene of the robbery since the government asserted that Burse's presence at the crime was the culmination of the alleged conspiracy. (Ibid.).

In the instant case the May 8 meeting was not alleged in the indictment and it was not incumbent upon the government to prove that such a meeting took place. Indeed, as we have pointed out, the theory of the government's case does not rise or fall on the occurrance of the May 8 meeting; our theory of the case is predicated on showing the existence of a series of meetings and conspiratorial activities during a four-and-one-half month period which were aimed at locating LaPolla and preventing his testimony by whatever means were required. Thus, the circumstances here are wholly unlike those before this Court in Burse.

VIII

APPELLANTS WERE NOT PREJUDICED BY VARIOUS JURY INSTRUCTIONS

A. TAKEN AS A WHOLE THE COURT'S INSTRUCTIONS ADEQUATELY APPRISED THE JURY THAT A DEFENDANT MUST AFFIRMATIVELY UNITE HIMSELF WITH THE CONSPIRACY BEFORE HE CAN BE CONVICTED

The rule in conspiracy cases is, of course, that mere knowledge, approval, or acquiescence in the existence of the conspiracy, without more, is not sufficient to sustain a finding of guilt. See, United States v. Sisca, 503 F.2d 1337, 1343 (2nd Cir. 1974), cert. denied, 419 U.S. 1008 (1974); United States v. Edwards, supra, 488 F.2d at 1158. The total impact of the court's instructions was to impress this rule on the jury. In determining whether the court has properly charged the jury on a point of law, it is inappropriate to view a fragment of the instruction in isolation; rather, an instruction must be viewed in its entirety [See, e.g., Cupp v. Naughten, 414 U.S. 141, 146-147 (1973); United States v. Finkelstein, 526 F.2d 517, 522 (2nd Cir. 1975)] and when a supplemental charge is given it must be viewed with the main charge as a whole [See, United States v. Hawes, 529 F.2d 472, 483 (5th Cir. 1976)]. Application of these principles does not support appellant's contention that the court's supplemental instruction allowed the jury to find membership in the conspiracy based only on "a smil or wink of the eye" (Brief, 45).

During its second day of deliberations, the jury questioned whether "the mere unreported knowledge of a

conspiracy [was] enough to make a person a co-conspirator" (Tr. XI, 3). Assuming the question referred to Zinni, the court responded in part that

> [b]efore he can be found to be a member of the conspiracy, he must know that others have formed a conspiracy. In other words, he must know that two or more people have combined to commit a crime and then before you can find him a member, he must get in on that arrangement. He may do that by the wink of an eye. I don't know. That is for you to decide. Did he in some way show that he assented to this? Did he become a party to it? Did he join in on it? and did he do so with an intent to promote it unlawful purpose? (Tr. XI, 10).

Zinni objected and asked for an instruction including the language in United States v. Falcone, 109 F.2d 579, 581 (2nd Cir. 1940), aff'd, 311 U.S. 205 (1940), that beyond assent, a defendant must "promote [the] venture himself, make it his own, have a stake in the outcome" (Tr. XI, 12). The court agreed and further instructed:

> As I told you, you must find that there is an assent by anyone in order to find that he has become a member. You must find that he assents to this. And as I told you in the main charge, he doesn't have to say in so many words "Count me in." And as I told you a moment ago, it may be just the wink of an eye. We all have little conspiracies in our lives. Husbands and wives have them, you have them with your children. You are going to buy your wife a present, your daughter knows about it and it's a little silent conspiracy you have and winks of an eye or a smile show that you have a common understanding. So here there must be an assent on his part to join in this, any act or anything he says of his own, not what someone else said or did, but what he himself says or does. He must in

> some way indicate or show that he is going along with this, that he is in on it, that he is part of this arrangement, that he adopts this plan as his own and that he is going to promote it, to promote it as his own and that he has a stake in its outcome. I think you should, therefore, consider all of this evidence. It isn't just this conversation. That is part of it. It's that conversation plus the entire context of circumstances known to those participants at that time. These words, like any other words, take on their meaning only in the context of the whole circumstances. Just as a word in a sentence means nothing unless you look at all the other words in the sentence or in the paragraph or sometimes in a whole book.
>
> Now, that is what you will have to decide. If you want anything further on it, give me a note. (Tr. XI, 13-14) (emphasis added).

Although appellants contend that the "wink of an eye" language is erroneous, when placed in the context of the entire charge it is clear that the court properly instructed that a defendant could be convicted only if he adopted the illicit plan and promoted it as his own. In giving the instruction to which appellants object, the trial court was dispelling, not buttressing, the impression that mere knowledge or acquiescence was sufficient to support a conviction.

That the jury was adequately instructed is even more apparent when the supplemental instructions are read in conjunction with the main jury charge (Tr. X, 116-137). In that charge the court noted that "much is left to implication and to tacit understanding" and instructed that in weighing the evidence the jury "should consider not only what [a

defendant] said or did, but also the way he said or did it, [because] [a]ctions speak louder than words" (Tr. X, 121-122). In charging that in order to convict the jury must find beyond a reasonable doubt that a defendant joined the conspiracy, the court stated:

> Now, when I say joined the conspiracy, I do not mean that he has to file some kind of a formal application for membership or that he has to sit down with others and agree in so many words, "Count me in", but before one can be found to be a conspirator, he must know of the existence of the conspiracy and of its purpose, and he must voluntarily and knowingly join with others in a common plan and with an intent to promote its unlawful purpose. Here the defendant whom you are considering must intend to join with others in a common plan to deprive LaPolla of his right and privilege to give information to the authorities about violations of the gun control laws or to harm him because he had testified before a Grand Jury or to silence him from testifying in the approaching trial of the M-16 case. (Tr. X, 125),

and then added:

> Now, the mere fact that a defendant may know that others have formed a conspiracy or be present when other people were talking about the conspiracy or have a friendship, an employment or association or any kind of a business relationship with another member of the conspiracy is not in itself enough to make him a conspirator unless you first find that he knew of the existence of the conspiracy and of its purpose, and voluntarily and knowingly joined with others in a common plan with an intent to promote its unlawful purpose. (Tr. X, 126).

After deliberations had commenced, the court, upon the jury's request, again read its entire charge on conspiracy (Tr. X, 152-172).

Thus, standing alone or read in conjunction with the main charge, the supplemental instruction adequately advised the jury that "there must be some basis for inferring that defendant knew about the enterprise and intended to participate in it or make it succeed." United States v. Cirillo, 499 F.2d 872, 883 (2nd Cir. 1974), cert. denied, 419 U.S. 1056 (1974).

B. APPELLANTS WERE IN NO WAY PREJUDICED BY THE COURT'S INSTRUCTION THAT APPELLANTS COULD BE HELD RESPONSIBLE FOR LaPOLLA'S DEATH, EVEN IF ACCIDENTAL, IF IT WAS INDUCED BY A CONSPIRATOR

Appellants requested an instruction that if LaPolla's death were accidental or if the jury was not persuaded beyond a reasonable doubt that it was deliberate they could not be found guilty of conspiracy with death resulting. The court instead instructed as follows:

> Death results from the conspiracy charged in the indictment if it was caused by an act of one or more of the conspirators in furtherance of the purpose of the conspiracy.
>
> Death, whether accidental or intentional, does not result from the conspiracy if caused by LaPolla's own act, unrelated to the conspiracy or its purposes provided the death was not induced or brought about by some act of a conspirator in furtherance of the purposes of the conspiracy. Likewise, death, whether accidental or intentional, does not result from the conspiracy if caused by the acts of any person who was not a member of the conspiracy or even if it were caused by a member of the conspiracy but not in furtherance of its purpose or within the scope of the conspiracy. (Tr. X, 135).

During summation appellants argued that LaPolla rigged the bomb himself out of fear of appellants and then accidentally detonated it himself (Tr. IX, 134-135). They urge that the charge given was erroneous because it did not advise the jury that they must acquit if LaPolla's death was accidental.

To determine whether appellants were prejudiced, it is necessary to view the instruction in the context of the facts adduced. See, Government of the Virgin Island v. Navarro, 513 F.2d 11, 16 (3rd Cir. 1975), cert. denied, 422 U.S. 1045 (1975). Here the evidence was substantial that LaPolla's death was the result of a criminal homicide. Chemical tests established that only a weak dynamite residue was found on LaPolla's left hand; had he been rigging an explosive device, however, residue would have been found on both hands. No such residue was found in LaPolla's vehicle (with the exception of a trace of residue where one window had been blown out by an explosion) indicating that he had not recently transported an explosive device in the vehicle.

Finally, the reconstruction of the explosion site offered strong, convincing evidence that the bomb was deliberately rigged to kill LaPolla. The bomb consisted of a firing device nailed only two-to-six inches behind the door, which, in turn, triggered a very large dynamite charge (enough to completely demolish the victim's house) hung beside the door. The closeness of the battery and switch to the door (as determined by nail holes in the linoleum floor), and the damage only to the upper front of LaPolla's body, indicated that LaPolla could not have been attempting to slide sideways into his residence when he detonated the bomb. Moreover, the bomb was placed too close to the front

door (which was the only door to his home) to allow the person who placed the bomb, and who knew it was there, to enter through the door in any way. These facts, taken together with the fact that LaPolla had left his car running when he hastily entered his residence indicate that he did not know the bomb was there, and thus did not place it himself and that he was not in the process of rigging the bomb when it was detonated. Had he known of the bomb he would not have entered as quickly or in the manner he did. Although LaPolla had experience in electronics, a thorough search of his car, body and residence revealed no dynamite or blasting caps.

The instruction adequately advised the jurors that they could convict only if LaPolla's death was "brought about by some act of a conspirator in furtherance of the purposes of the conspiracy." The facts adduced at trial afforded no reasonable basis for the contention that LaPolla rigged and then acidentally detonated the bomb. Thus we do not believe the appellants were entitled to an accidental death instruction. Assuming, arguendo, that they were, the overwhelming evidence was utterly at odds with the accident theory and thus appellants were not prejudiced in any way by the instruction given in regard.[30/]

30/ Appellant Guillette also claims that the trial court erred in failing to instruct the jury that the intimidation alleged the obstruction of justice charge (Count II) occurred in Connecticutt (Brief, 45-46; App. 156-157). There is no merit to this claim. The Court fully and (CONT'D)

IX

THERE WAS SUFFICIENT EVIDENCE TO SUPPORT APPELLANTS' CONVICTIONS

Viewing the evidence in the light most favorable to the government [Glasser v. United States, 315 U.S. 60, 80 (1942); United States v. McCarthy, 473 F.2d 300, 302 (2nd Cir. 1972)] and making all reasonable inferences and credibility choices supporting the jury's verdicts [United States v. Squella-Avendano, 478 F.2d 433 (5th Cir.

30/ (CON'T) adequately instructed the jury with respect to the obstruction charge (Tr. X, 138-140). The situs of the offense established venue in the District of Connecticut, as the indictment alleged, by virtue of the pending indictment in that District. See United v. O'Dennell, 510 F.2d 1190 (6th Cir. 1975), cert. denied, 421 U.S. 1001. The court instructed the jury that an element of the offense, as to which there was no dispute, was that an indictment was pending against appellant in that district and that appellant was aware of the indictment (Tr. X, 38). Moreover, the jury had a copy of the indictment its deliberations (Tr. X, 113). It alleged as follows:

> On or about September 29, 1972, in the District of Connecticut, David Guillette unlawfully, wilfully and knowingly endeavored, by force and violence, to influence, intimidate and impede Daniel Lapolla, a witness in a Court of the United States, a witness in the matter of the United States v. William Marrapese, Nicholas Zinni, David Guillette and Robert Moose, Criminal No. H-264, which was before the United States District Court for the District of Connecticut
>
> All in violation of Title 18, United States Code, Section 1503.

In any event, the government at no time maintained that the obstruction of justice -- which consisted of the September 29, 1972, explosion resulting in LaPolla's death at his residence in Oneco, Connecticut--occurred other than in the District of Connecticut.

1973)], the evidence adduced at the trial below supported both appellants' convictions of conspiracy resulting in death and Guillette's conviction for obstruction of justice.

The evidence of appellants' involvement in the charged criminal enterprise has been set out in detail in the Statement of Facts (supra, pp.4-14) and it is not necessary to once again extensively review the evidence. The government showed that in early May, 1972, appellants became aware that LaPolla was a government informant in a federal case pending against them. Within days a plan was developed to silence LaPolla's testimony, and Joost and Guillette introduced John Housand to their fellow conspirators as a hit-man who would kill LaPolla for $5,000. On advice of an attorney, appellants agreed to postpone killing LaPolla until the strength of the government's case was assessed. During this interim, both appellants agreed that efforts should be made to locate LaPolla and, for the time being, silence him by beatings or bribery. As time went on, the inability of the conspirators to locate LaPolla become more critical and Guillette suggested that LaPolla would have to be "dumped" if Marrapese could not locate him.

Central to the conspiratorial purpose was locating LaPolla and unusual and extraordinary efforts were employed by Joost, Guillette and Marrapese both in Providence and Oneco in this regard, including deception, a graveyard surveillance, airplane rides under false pretenses, visitations to a funeral home, and a high-speed chase to avoid police inquiry.

At trial Weronik testified

These efforts to locate LaPolla began in May, 1972, became more concentrated as appellants' trial approached, and continued on the day preceding LaPolla's death. On September 29, only a few hours before the fatal explosion, Guillette was to confide that he had "just left a package for your [Marrapese's] buddy up there." Months later, Guillette was to admit that he placed the bomb.

The government demonstrated that appellants had both a strong motive to kill LaPolla, and that Guillette had the necessary materials and technical expertise to construct an explosive device. Moreover, both Guillette and Joost deceived Williams, the pilot, as to the purpose of the airplane flights to Oneco and following LaPolla's death Guillette asked Williams not to mention the flights to anyone. Such an effort to induce Williams to conceal Guillette's activites was probative of his guilty state of mind. Cf. United States v. Abney, 508 F.2d 1285 (4th Cir. 1975), cert. denied, 420 U.S. 1007 (1975). So too, Guillette lied to an agent when he denied having ever been in Oneco and Joost lied when he said that he had never hidden in the tree-line across from LaPolla's house. Such false statements, particularly false exculpatory statements to law enforcement agents, are strong evidence of guilt. United States v. Johnson, 513 F.2d 819, 824 (2nd Cir. 1975); United States v. Parness, 503 F.2d 430, 438 (2nd Cir. 1974), cert. denied, 419 U.S.1105 (1975); United States v. Lacey, 459 F.2d 86, 89 (2nd Cir. 1972).

Thus the evidence was sufficient to support appellants convictions on the conspiracy count and Guillette's conviction for obstructing justice.[31/]

CONCLUSION

It is therefore respectfully submitted that the appellants' convictions should be affirmed.

PETER C. DORSEY
United States Attorney
New Haven, Conn. 06508

PAUL E. COFFEY,
Special Attorney
Hartford, Conn. 06103

ROBERT J. ERICKSON,
Attorney
Department of Justice
Washington, D.C. 20530

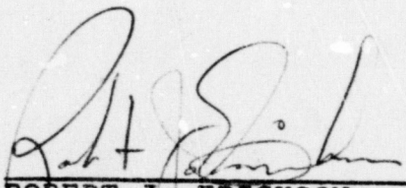
31/ In asserting this claim, appellants' attack is two-fold. First, that Marrapese's testimony was unbelievable; and second, that by acquitting Guillette on Count III, the jury must have rejected all evidence which could have supported Guillette's conviction on Count II. However, Marrapese's credibility was for the properly instructed jury to decide and it obviously credited his testimony. Moreover, that some inconsistency existed between Guillette's conviction on Count II and acquittal on Count III is of no benefit to Guillette in arguing for a judgment of acquittal. His technical expertise, his statement to Marrapese immediately preceding the explosion, and his admissions at Amando's Restaurant would have supported his conviction on either or both counts. In acquitting Guillette of the more serious substantive count, the jury may only have exercised its prerogative to show leniency. United States v. Robinson, 475 F.2d 376, 383 (D.C. Cir. 1973).

CERTIFICATE OF SERVICE

I hereby certify that on June 1, 1976, copies of the Brief of the Appellee, United States of America, were mailed to counsel for appellants by air mail and special delivery at the following addresses:

Hubert J. Santos, Esq.
51 Russ Street
Hartford, Connecticut

James A. Wade, Esq.
799 Main Street
Hartford, Connecticut



ROBERT J. ERICKSON
Attorney, Appellate Section
U.S. Department of Justice
P.O. Box 899
Ben Franklin Station
Washington, D.C. 20044